

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Trustees of the NEW MEXICO PIPE TRADES HEALTH
& WELFARE TRUST FUND; Trustees of the NEW MEXICO
PIPE TRADES JOINT APPRENTICESHIP TRUST
FUND; Trustees of the NEW MEXICO PIPE TRADES PENSION
PLAN B TRUST FUND, Trustees of the PLUMBERS &
PIPEFITTERS NATIONAL PENSION PLAN;
Trustees of the INTERNATIONAL TRAINING TRUST FUND,
and BUILD NEW MEXICO,

Plaintiffs,

v.

No. 1:11-cv-01065 WJ/ RHS

MARES PLUMBING & MECHANICAL, INC.,
a New Mexico Corporation,

Defendant.

MEMORANDUM OPINION AND ORDER
GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court upon Plaintiffs' Amended Motion for Summary Judgment, filed October 17, 2012 (**Doc. 64**).¹ Having reviewed the parties' briefs and applicable law, I find that Plaintiffs' motion is well-taken and shall be granted.

BACKGROUND

This is a collection action brought under §§ 502 and 515 of the Employee Retirement Income Security act of 1974, as amended, 29 U.S.C. §§ 1132 and 1145 ("ERISA"). Plaintiffs seek payment of delinquent fringe benefit contributions owed by Defendant to Plaintiffs.

Plaintiffs are the Trustees of five multi-employer, jointly-trusted welfare benefit and pension trust funds within the meaning of §3(1) of ERISA, 29 U.S.C. §1002(1) and §3(2) of ERISA, 29

¹ The Court assumes that this "amended" summary judgment motion, Doc. 33, supersedes Plaintiffs' previous summary judgment motion, Doc. 32.

U.S.C. §1002(2) (hereinafter, “Plaintiffs” or “Plaintiff Trust Funds”). Defendant Mares Plumbing and Mechanical, Inc. (“Mares Plumbing” or “Defendant”) is a New Mexico corporation and an employer within the meaning of §§3(5) and 515 of ERISA, 29 U.S.C. §§1002(5) and 1145, and is engaged in an industry affecting commerce.

Under ERISA, the Trustees have a fiduciary duty to “act to ensure that [the] plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries.” *Central States, Se. & Sw. Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 571 (1985); *Holdeman v. Devine*, 572 F.3d 1190, 1193 (10th Cir. 2009). Accordingly, the Trustees filed an action in this Court to collect the delinquent contributions owed by Mares Plumbing. The Amended Complaint states that Mares Plumbing signed a collective bargaining agreement (“CBA” or “Agreement”) with Local 412 in 2006. Pursuant to the CBA, Mares Plumbing was obligated to file timely payroll reports on the fourteenth day of each month, make monthly fringe benefit contributions on all employees to the Trust Funds, and comply with the terms of the Agreements and Declarations of Trust of the Trust Funds. The CBA was effective from April 1, 2006 through March 31, 2010.

In the Amended Complaint, Plaintiffs allege that Mares Plumbing failed to make fringe benefits payments to the Trust Funds from March through September 2011. In Count I of the Amended Complaint (Doc. 7), Plaintiff seeks delinquent contributions, including liquidated damages and interest. Under the terms of the CBA, Defendant owes liquidated damages at the rate of eighteen percent (18%) per annum on all of the unpaid fringe benefit contributions over 60 days past due; and interest at the rate of twelve percent (12%) per annum on all of the unpaid fringe benefit contributions for that period. In addition, Plaintiff requests amounts owing on interest and liquidated damages on unpaid fringe benefits and contributions. *See* Am. Compl., at

10-12. In Count II, Plaintiffs seek a preliminary and permanent injunction compelling Defendant to pay past and present fringe benefit contributions and that all checks for payment be made joint checks with the Plaintiff Trust Funds as co-payee, and be deposited in a trust fund account. Plaintiffs also seek an injunction requiring Defendant to turn over any non-joint checks received by Defendant for any work done in the past, present, or future to Plaintiff Trust Fund to process for the payment of fringe benefit contributions; and requiring Defendant to promptly file its employer payroll reports and produce all books and records as needed by Plaintiffs' auditor for evaluation.

DISCUSSION

Plaintiffs seek summary judgment against Defendant on all their claims, namely, liability for the delinquency of Defendants' contributions in to the fringe benefit trust funds, and the amounts of contribution owed.

I. Legal Standard

Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). “[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue’ that party must ‘go beyond the pleadings’ and ‘designate specific facts’ so as to ‘make a showing sufficient to establish the existence of an element essential to that party's case’ in order to survive summary judgment.” *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir. 1998) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)) (citing *Ford v. West*, 222 F.3d 767, 774 (10th Cir. 2000)).

Defendant has not filed a response. By failing to file a response to a Rule 56 motion, a nonmoving party waives the right to file a response and confesses all facts asserted and properly

supported in the motion. *Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 (10th Cir. 2002).

In ruling on this motion, then, the Court should assess the facts set forth by Plaintiffs to determine if those facts entitle them to summary judgment as a matter of law. *Reed v. Bennett*, 312 F.3d 1190, 1195-95 (10th Cir. 2002).

II. Past Rulings

Before this case was reassigned to the undersigned as presiding district court judge, United States District Court Judge Bruce D. Black made certain rulings on Plaintiffs' motion to dismiss. Judge Black dismissed Defendants' affirmative defenses and counterclaims as barred by preemption under ERISA and struck Defendant's jury demand. Doc. 29.² The instant motion addresses the remaining issues of liability and the amounts of contributions owed by Defendants.

III. Plaintiffs' Undisputed Facts and Analysis

Plaintiffs have set forth detailed facts for their contentions that Defendant is liable to them for the delinquent contributions, interest, liquidated damages, attorneys' fees, auditor's fees and costs; and details regarding the amounts of the various categories of damages. Plaintiffs have offered exhibits (Docs. 64-1 to 64-6) supporting these facts. Rather than engage in a pointless reiteration of these details, the Court focuses on the salient facts which have relevance to the Court's ruling in favor of Plaintiffs.³

Under the CBA executed between Plaintiffs and Mares Plumbing, Mares was obligated to pay all wages and fringe benefits up through the date of termination of the Agreement. The

² United States District Court Judge Judith C. Herrera presided over a similar case in which plaintiffs were health and pension plans for sheet metal workers' unions. Defendant Mares Plumbing was the defendant in that case as well. *See Trustees of Sheet Metal Workers Local Union 49 Family Health Plan et al. v. Mares Plumbing & Mechanical, Inc.*, No. 11-CV-898 JCH/CG. In that case, defendants concede liability on plaintiffs' claims. Judge Herrera found that defendants' state law counterclaims were preempted by ERISA; dismissed their counterclaims by waiver; and struck defendants' jury demand. *See* Docs. 44, 55 & 126.

³ Supporting documentation is referenced in Defendants' recitation of undisputed facts, Doc. 64 at 2-9.

Labor Agreement in effect from April 1, 2010 through March 31, 2013 was the April 1, 2010 – March 31, 2015 Centennial Labor Agreement (“Centennial Labor Agreement”). It is undisputed that Mares is an employer within the meaning of §§3(5) and 515 of ERISAS, and that he was obligated to make payments into the Trust Funds for each hour worked by the union members at a certain point during each calendar month. Plaintiffs, by their Trust Agreements, or adopted Collection Procedures are entitled to collect unpaid fringe benefit contributions plus interest, liquidated damages, audit fees, costs and attorneys’ fees from Defendant. The procedures for collecting liquidated damages for delinquent payments to the National Pension Fund and local Trust Funds are also outlined in those documents. The hourly fringe benefit contribution rates set forth in the CBA’s are indicated in Fact No. 5.

Mares became delinquent in its payment of fringe benefit contributions to Plaintiffs. Pursuant to the CBA, the Trust Agreements and ERISA, Plaintiffs engaged the services of an accounting firm (“Robert Baldwin, CPA”) to conduct a targeted audit of Defendant’s books and records. Plaintiffs sent demand letters to Mares, and pursuant to the Miller Act, 40 U.S.C. § 3131 et seq., and the Little Miller Act, NMSA 1978 § 13-4-10 et seq., Plaintiff sent a Notice of Miller Act and Little Miller Act Claim to each of the general contractors for whom Mares was performing or had performed work on pursuant to the auditors’ report.

By letter dated January 25, 2013, Local Union 412 has now terminated its CBA with Defendant effective March 31, 2013.

As of the date of Plaintiffs’ summary judgment motion, payments totaling \$12,401.73 (representing recovery of delinquent fringe benefit contributions, interest and liquidated damages) have been recovered from three of the general contractors through negotiation or lawsuits pursuant to the Miller Act or Little Miller Act, or lawsuits filed against the general

contractors. Mr. Baldwin conducted a supplemental payroll audit as a result of additional payroll reports revealing additional hours for work performed by Mares Plumbing during the second half of March, 2013. As a result of the April 15, 2013 supplemental payroll audit, Mares owes \$25,193.94 in fringe benefit contributions through March 31, 2013, \$4,500.00 in late filing fees, \$3,590.20 in interest and \$2,946.41 in liquidated damages calculated through April 15, 2013. The amounts total \$36,230.55. The amounts are broken down in Fact No. 13 according to the following funds:

	Unpaid Fringe Contributions	Interest	Liquidated Damages
NM Pipe Trades Health & Welfare Trust Fund	\$14,744.80	\$2,222.80 @ 18% per annum	\$1,800.60 @ 18% per annum
NM Pipe Trades Joint Apprenticeship Trust Fund	\$1,892.65	\$270.84 @ 18% per annum	\$216.74 @ 18% per annum
NM Pipe Trades Pension Plan B Trust Fund	\$1,974.75	\$297.68 @ 18% per annum	\$241.15 @ 18% per annum
National Pension Plan	\$6,174.70	\$743.66 @ 12% per annum	\$617.47 @ 10% per annum
International Training Fund	\$352.26	\$55.22 @ 12% per annum	\$70.45 @ 20% per annum
Build New Mexico	\$54.78	-----	-----

Defendant has also incurred \$4,500.00 in late filing fees. Plaintiffs describe, and provide supporting documentation for additional expenses incurred:

- Total amount claimed for Attorneys' fees through March 31, 2013 is \$102,150.86, broken down as follows:
 - 230.35 hours at \$300.00 per hour;
 - 153.20 hours of legal assistant time at \$100.00 per hour;
 - Total of attorneys' fees incurred: \$69,105.00 and
 - Total of legal assistant fees incurred is \$15,320.00.
 - Audit fees through April 15, 2013 in the amount of \$10,666.18;

- Total of the costs of litigation to date is \$1,149.93, including \$547.95 in filing and service fees on Mares and \$601.98 in Miller Act service and notice fees; and
- gross receipts taxes of \$5,909.75.

Collection of attorneys' fees, audit fees, and costs of collection are recoverable from Defendants both pursuant to ERISA §502(g)(2), 29 U.S.C. §1132 and the Trust Agreements and Collection Procedures of the Plaintiffs. Section 502(g)(2)(E) also provides for "such other legal or equitable relief as the court deems appropriate." In Count II of the Amended Complaint, Plaintiffs seek injunctive relief requiring Defendant to turn over to Plaintiff Trust Funds all checks, including any non-joint checks received by Defendant for any work done in the past, present, or future, so that Plaintiff Trust Fund may process the checks for the payment of fringe benefit contributions. Plaintiffs also seek to require Defendant to promptly file its employer payroll reports and produce all books and records as needed by Plaintiffs' auditor for evaluation. Based on Plaintiffs' undisputed facts and supporting documentation, and as authorized under the ERISA statute, Plaintiffs are entitled to the requested injunctive relief.

CONCLUSION

In sum, I find and conclude that there are no disputed material facts either as to Defendant's liability, or amounts owed by Defendant to Plaintiffs. Plaintiffs have shown that Defendant did not make its monthly fringe benefit contribution obligations to Plaintiff with supporting documentation consisting of numerous affidavits, declarations and auditing and accounting reports. Based on this evidence, as well as the relevant law under the ERISA statutes, I find that Plaintiffs are entitled the damages sought, including attorneys' fees and costs.

Also, the Court finds Plaintiffs' request for attorney fees reasonable under *Hensley v. Eckerhart*, 461 U. S. 424, 433-34 (1983). Plaintiffs have provided the necessary time sheets and affidavits to support their request. *See* Doc. 64-6.

The Court finds only one discrepancy. On page 7 of the motion, Plaintiffs state:

As a result of the April 15, 2013 supplemental payroll audit, Mares owes \$25,193.94 in fringe benefit contributions through March 31, 2013, \$4,500 in late filing fees, \$3,590.20 in interest and \$2,946.41 in liquidated damages calculated through April 15, 2013. The amounts total **\$36,230.55** . . .

Fact No. 13 (emphasis added). However, when the amounts owed to the separate funds are added together (see chart above), the total is only \$31,730.55. Adding in the late filing fees of \$4,500.00 brings the amount to the stated total of \$36,230.55. It is not clear how the amounts of \$3,590.20 in interest and \$2,946.41 in liquidated damages figure into the calculations, since the various trust fund categories (indicated by the chart) already seem to take into account interest and liquidated damages. Therefore, the Court will consider \$36,230.55 to be the total amount sought representing fringe benefit contributions, all interest and liquidated damages,⁴ and late filing fees. The Court thus finds Plaintiffs entitled to the following amounts:

Damages for fringe benefit contributions, interest, liquidated damages and late filing fees:	\$36,230.55
Attorneys' fees and costs:	\$102,150.86
TOTAL	\$138,381.41

THEREFORE,

IT IS ORDERED that Plaintiffs' Amended Motion for Summary Judgment (**Doc. 33**) is hereby GRANTED in that Plaintiffs are entitled to the amount of **\$138,381.41** from Defendant

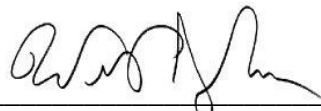
⁴ Also, all amounts calculated appear to be current through March 31, 2013 except for liquidated damages which appear calculated through April 15, 2013. Fact No. 13.

Mares Plumbing, which includes damages resulting and flowing from delinquent contribution to Plaintiffs' pension funds, and for attorneys' fees;

IT IS FURTHER ORDERED that Plaintiffs are entitled to the requested injunctive relief, namely:

- Defendant is ordered to pay the above amounts representing past and present fringe benefit contributions, and attorneys' fees and costs;
- All checks for payment shall be made joint checks with the Plaintiff Trust Funds as co-payee, and be deposited in a trust fund account;
- Defendant shall turn over any non-joint checks received by Defendant for any work done in the past, present, or future to Plaintiff Trust Fund to process for the payment of fringe benefit contributions;
- Defendant shall promptly file its employer payroll reports and produce all books and records as needed by Plaintiffs' auditor for evaluation.

A Judgment will be entered separately.



UNITED STATES DISTRICT JUDGE